ORIGINAL

In the

Supreme Court of the United States

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent

No. 76-99

Washington, D.C.
April 26, 1977

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v.	:	No. 76-99
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Respondent.	:	

Washington, D. C.

Wednesday, April 20, 1977

The above-entitled matter came on for argument at 1:58 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

DENNIS H. VAUGHN, ESQ., 555 South Flower Street, Los Angeles, California, 90071, for the Petitioner.

THOMAS S. MARTIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C., 20530, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-99, Occidental Life Insurance Company of California against Equal Employment Opportunity Commission.

Mr. Vaughn.

ORAL ARGUMENT OF DENNIS H. VAUGHN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. VAUGHN: Mr. Chief Justice, and may it please the Court:

The Court of Appeals for the Ninth Circuit held below that the EEOC has infinity within which to sue on an individual charge of discrimination. In other words, that there is no time limitation, whatsoever, upon that agency, a position advocated by the EEOC to that court.

Now, the Ninth Circuit so held in the context of a suit alleging wide-ranging practices and acts of sex discrimination against both females and males, a suit that was predicated upon a single charge of discrimination filed by one individual female protesting her discharge, which she claimed to be discriminatory. And that discharge occurred some three years and four months prior to the date upon which the EEOC got into the Federal District Court with its complaint.

Now, it is Petitioner's position that infinity is not and cannot be the only parameter on the EEOC's right to sue.

First, it is our position that inherent in the statute

itself is a 180-day limitation on the right to sue granted to the EEOC by that statute.

And, secondly, it is our position that if, in fact, there is no federal limitation,then the most analogous state statute of limitation governs the EEOC's right to bring suit.

QUESTION: I notice in the briefs here nobody seems to have identified the most analogous state statute or argued about which one it might be.

MR. VAUGHN: Yes, Your Honor.

QUESTION: Where, in California?

MR. VAUGHN: That is right.

QUESTION: So, it would be a California statute if your second argument is correct.

MR. VAUGHN: That is right, Mr. Justice Stewart.

QUESTION: Then, might it be a different statute if it's one for money, back pay, from what it might be if it were only for an injunction?

MR. VAUGHN: I do not know.

QUESTION: In other words, if only for an injunction, there would be no statute at all, but the state doctrine of laches.

MR. VAUGHN: No, Your Honor, I do not believe there would be a distinction under California law, under the California statute, between a suit for injunctive relief and a suit for back pay.

QUESTION: But there is no identification anywhere in these briefs that I saw of what the most analogous state statute might be.

MR. VAUGHN: Well, Mr. Justice Stewart, the Court of Appeals, of course, because of its view that there was no limitation, whatsoever, did not reach the issue. The District Court held that the one-year statute of limitations in California was applicable, and that was an alternative holding in the court's granting of our motion for summary judgment. The District Court had held that there was a 180-day federal limitation in Title 7 and alternatively that the one-year statute of limitations, under California law, was applicable.

QUESTION: What is that statute, for a penalty or --

MR. VAUGHN: That is a --

QUESTION: Is it a catch-all statute or --

MR. VAUGHN: That is a statute for wrongful injury. It is Code of Civil Procedures, Section 343, injury caused by the wrongful act of another.

Now, there is additionally a second statute, Code of Civil Procedures, Section 3381, which is an action upon a liability created by statute, other than for a penalty or a forfeiture.

So, it has been our position, it was our position before the District Court, it was our position before the Court of Appeals that one of the two statutes was applicable.

Regardless of which applied, the suit was barred.

QUESTION: Each was a one-year statute?

MR. VAUGHN: No, I am sorry, the first for wrongful injury was one year. The second statute is three years.

QUESTION: How long elapsed here? It would have been barred even by the three-year statute?

MR. VAUGHN: Yes, that is right, Mr. Justice Rehnquist. The complaint was filed over three years and four months from the date upon which the discriminatory act occurred, being the discharge of the charging party, Tamar Edelson, on or about October 1, 1970. Suit was filed on February 22, 1974.

QUESTION: It then was a pattern or practice suit, wasn't it?

MR. VAUGHN: Mr. Justice Stewart, when the suit was brought, yes, it was -- I don't know whether pattern and practices is quite the right word. It was not an Attorney General suit under the old pattern and practice provisions of the '64 Act, but it did allege wide-ranging acts and practices of discrimination by the Petitioner against both female employees and male employees, going all the way back to the effective date of the Civil Rights Act in 1964.

QUESTION: But, all the way up to the time the suit was filed, wasn't it? All the way forward in time until the time the suit was filed. Wasn't it an allegation of a continuing violation?

MR. VAUGHN: The allegations of the complaint, Mr. Justice Stewart, yes.

QUESTION: So when the statute began to run. It is your claim that it ran from the discharge of the original complaining party.

MR. VAUGHN: That is correct.

QUESTION: Arguably, it might run from -- according to the Government's allegation -- that it was going on at the time of the suit.

MR. VAUGHN: Mr. Justice Stewart, it should be recognized that nowhere in the pleadings before the District Court did the EEOC at any time argue that there was a continuing violation. Furthermore, that argument came into this proceeding for the first time in a reply brief that was filed to the Court of Appeals for the Ninth Circuit. It does not appear, I don't believe, in the brief filed by the agency or by the Solicitor General with this Court. But, in any event, it was raised for the first time, belatedly, on appeal.

Now, with respect to the 180-day federal limitation -- that limitation is found in Section 706 (f)(1) of the Act -- when it is read in the context of the legislative history, certain portions of which I would like to highlight for the Court.

Senator Dominick, who was the principal spokesman for the bill that ultimately passed the Senate, referred to the

180-day provision as, quote, "the time-period within which the Commission may file a civil action," end of quote.

And Senator Javits referred to it as, quote, "the allowable time for the Commission to move into a given situation," end of quote.

Now, these weren't the only two comments. Throughout the legislative history there was the very strong expression by Congress that the eighteen months, that the two years that it was taking the EEOC then to act was unfair to charging parties, was a denial to them of justice. Justice delayed is justice denied, a phrase seen throughout the legislative history.

And there was a determination, a very strong conviction that this same delay and inaction by the agency was unfair to Respondent. And there was a clear congressional determination in 1972 that this situation had to be changed in order to prevent it from continuing.

Now, the EEOC has struggled to breath some meaning into this language, the 180-day language, as an alternative to our interpretation. And, thus, the EEOC has argued that because Congress was aware, in '72, that it took a year or two for the EEOC to dispose of charges because there was a backlog, that Congress couldn't possibly have intended the 180-day provision as a suit limitation.

And, then, according to the EEOC, the 180-day

provision is simply an expression of a private filing restriction on the individual victim of discrimination.

But this position necessarily flounders, both on the expression of congressional intention, but also on logic. For this position of the EEOC assumes, first of all, that Congress intended to build a system in 1972 that would perpetuate, that would build into the system forevermore the very delays that it abhorred and was attempting by the new mechanism to eliminate.

And, secondly, the EEOC's position assumes that Congress made the deliberate choice to extend the period during which a victim of discrimination could not sue, himself or herself, even though Congress knew full well that the EEOC, during that period, would not or could not do anything for that victim of discrimination.

In other words, Congress in 1972 took the former 30 to 60 restriction on an individual filing suit and extended it to 180 days. Now, did Congress extend it just to restrain the individual from being able to pursue his own rights, if it knew that the EEOC couldn't or wouldn't do anything?

It simply doesn't make sense. It's an anomalous and incongrous intention to attribute to Congress and clearly at odds with their manifest intention.

QUESTION: Mr. Vaughn, may I ask a question, just to get the whole scene in perspective?

MR. VAUGHN: Yes, Mr. Justice Stevens.

QUESTION: No right to sue letter was issued to the employee in this case, is that correct?

MR. VAUGHN: No formal --

QUESTION: No formal notice.

MR. VAUGHN: No formal notification. The record demonstrates that she was advised that she could bring suit and she requested that the case be sent to San Francisco, the EEOC's original litigation office, for consideration as a Vehicle 4 litigation.

QUESTION: What I was leading up to is: Does she now have a right to sue if she got the right kind of letter from the EEOC? Would she be barred?

MR. VAUGHN: If a right to sue letter now was issued? Well, I would say, certainly not, Mr. Justice Stevens.

QUESTION: She would not be barred?

MR. VAUGHN: She would be barred, that she would not have the right to sue at this juncture. The fact is that it is quite academic, I would say, to Ms. Edelson. The record will reflect that she was reinstated in her job six days after the charge was filed, and thereafter she voluntarily terminated.

QUESTION: Let me put the question a little differently: If, instead of suing itself, the EEOC had issued the appropriate letter to her, could she then have brought a suit, even though a couple of years had gone by?

MR. VAUGHN: Mr. Justice Stevens, the question you

are asking me is what are the conditions to maintenance of suit by private individual? And that, of course, is not a question before the Court in this case.

I think the statute -- it read logically in light of the legislative history -- would indicate that the agency had 180 days in which to act. Having not acted, a notice of right to sue should have been forwarded, a formal notice -- which it was not -- and then the charging party would have an additional 90-day period thereafter.

I think, therefore, that Ms. Edelson would not now have the right to sue. It is now, after all, almost seven years from the date of her discharge. I think that she would be barred.

QUESTION: What I am really asking, I suppose is -- because you don't rely on expressed limitation language, but rather an implied limitation, and the statutory scheme seems to fit together as you argue it.

But does that also mean that there is a total -- I mean there really is a statutory repose after this period of time has gone by and the employer can now be sure there is no litigation coming.

In other words, is there a correlation between the private right to sue and the Government right to sue?

Or do we have to decide it? Maybe we don't have to decide it.

MR. VAUGHN: Well, Mr. Justice Stevens, I think I suggested at the outset that I don't think you have to decide it. The question is not before you. I do think, as I indicated, logically, that you would track the 180-day provision and the 90-day provision, but, frankly, I can see that the Court might take a different approach to an individual charging party who had not received notice of his or her right to sue, who had been misled by the EEOC.

While your decision in Johnson v. Railway Express Agency in which you indicated how little was at stake in that case, in fact, that the individual was not then able to sue -- Because there were continuing violations, new charges could be brought. -- That case, I think, could be argued on the other side of what I've indicated, and that is that the right to sue would be barred.

I think it is a much more difficult question and --

QUESTION: The reason I think it may be more relevant, Mr. Vaughn, is that if you are arguing implicit limitation, rather than expressed limitations, it seems to me we must have a pretty clear picture how the whole statutory scheme fits together. That's why it was troubling me.

In other words, I think it may be necessary to at least think that through. I am not sure what the answer is.

MR. VAUGHN: Mr. Justice Stevens, I'm not sure what the answer is either. I can only say I don't think you need to

decide it in this case. And I can see arguments being made on both sides. I think it is logical that she would be barred. I believe that Johnson v. REA would tend to support that conclusion. On the other hand, I can see the Court taking a different view, perhaps with respect to an innocent party who had been misled by the EEOC.

QUESTION: Mr. Vaughn, your position is that nobody can sue Occidental after two years. Do you go that far?

MR. VAUGHN: Mr. Justice Marshall, I don't go that far. Again, I don't think the Court needs to reach the question of under what circumstances a charging party could bring suit.

Our position goes so far as to say that the EEOC was prohibited in this case from bringing suit three years and four months after the discharge in question, whether it was prohibited by a 180-day federal statute, or whether it was prohibited by a state statute, the most applicable state statute.

QUESTION: But, isn't that the reverse of what one would usually think the statute of limitations applies to? The Government usually has a longer period of limitations or a Government agency has a longer period of limitation than a private individual.

MR. VAUGHN: Mr. Justice Rehnquist, I think this, perhaps, is a unique case because the foundation for what is

usually the case, I believe, normally, would be an interpretation of congressional intention. Here, Congress was outraged. Outraged by the delays and the inaction that this agency was pursuing in the enforcement of the Act. They intended, I think it is clear, to put a relatively short time limitation upon the right to sue.

After all, in this same section, Section 706(f)(1), there is a provision that the charging party, after receiving a notice of right to sue, will have 90 days within which to sue, a lesser time, in fact, than the 180 days.

QUESTION: Well, why doesn't that govern the charging party's right here? Is it that she didn't receive the notice?

MR. VAUGHN: Well, we have no issue, Mr. Justice Rehnquist, before us as to Ms. Edelson's -- the charging party's -- right to do anything. She did not receive the formal notice of right to sue. The record will demonstrate that she was advised informally of her right to sue and she declined to pursue it, requesting that the matter be considered as a possible litigation vehicle. And that, of course, is, in turn, what ended up happening when the EEOC brought suit, lo, some three years, four months, later.

QUESTION: Mr. Vaughn, I am a little concerned about the practical results. If you prevail here, then I suppose, assuming there is sufficient manpower, the EEOC will bring a lot of suits near the end of the 180-day period.

Is that something that would be beneficial to employers? Is it something they really would want?

MR. VAUGHN: Mr. Justice Blackmun, I think not only would employers want that, I think that that is what charging parties would want. I think that is what private counsel for plaintiffs want.

Part of the great problem with the inaction of the EEOC is that, quite frankly, from an employer's point of view, he can take a charge, he can sweep it under the rug because nobody is asking him or requiring him to make any sort of decision whatsoever. And under the rug it sits and it languishes. And he is never required to make a judgment: Now did I make a mistake? Did I violate the law and what should I do about it?

And these cases become much harder to settle, quite frankly, five and six and seven years down the road, when there is a substantial back pay liability involved, than they are if you hit them right up front.

Now, obviously, charging parties would be benefited. Charging parties now have their charges languishing before the EEOC, action is not taken. The EEOC goes out, they have a charge filed by an individual, alleged discriminee. Let's say a racial charge.

At first, the EEOC does not do anything about it and then it does go out to conduct an investigation, but then it

starts investigating whether there is religious discrimination or sex discrimination, whatever else, in addition to the particular charge of racial discrimination, or minority status discrimination.

In the meantime, the charging party sits. And, all the while, the EEOC doesn't issue the 180-day notice that that charging party has a right to sue. So he is not or she is not pursuing individual rights.

It is a very unfair system to charging parties. It is a very unfair system to respondents, to employers and it is a terrible system insofar as the courts are concerned because the courts are being clogged with stale, time-consuming cases, going back years and years and years.

QUESTION: Well, my suggestion was that they might be clogged even more if you prevail here.

MR. VAUGHN: You know, I think that's a good question, Mr. Justice Blackmun, and I think it is not the case. I really do believe that a lawyer confronted with a deadline -- We are going to settle this case in 30 days or we, the EEOC, will file suit. You've got no choice, as a lawyer for your client but to turn to look at that case and make a judgment.

I think if the EEOC pursued its responsibilities that there would be more effective conciliation, and there would be faster action, more cases would be settled, and I

don't believe the courts would be clogged.

But, even assuming arguendo that they were, certainly it would be better to be clogging them with new cases than cases that are four and five and six years old, which is the case --

QUESTION: Doesn't that also tend to mitigate the damages, the back pay award? Shouldn't the employer make a judgment very quickly whether he should or should not wash it out?

MR. VAUGHN: I think that's one of the most important practical points, Mr. Chief Justice, that if you've made a mistake, that's something you are going to face up to earlier, much more readily than you are five and six and seven years down the road.

And this is the problem. You don't make those judgments now because nobody is holding your feet to the fire.

Now, by analogy, let's talk about the National Labor Relations Board for a moment. It, of course, has a different -- a cease and desist type authority and that authority was denied to the EEOC.

But let's take an example of two employees, side by side, working at machines in a factory. One employee, a white employee, is discharged for union activity. The other employee, a minority, is discharged because of his race or ethnic origin.

What happens? The union organizer goes to the

National Labor Relations Board and he files a charge. Within a median time of 14 days, the investigation is completed. The charge, having been investigated, the Board finding merit, a complaint is filed. A hearing is held before an administrative law judge. The administrative law judge's decision goes to the NRLB in Washington. Court enforcement proceedings are begun and eventually a Court of Appeals does enforce the order of the Board for reinstatement and back pay.

That is two and one-half years, according to the legislative history in connection with these amendments. Two and one-half years from the date of the charge with the NLRB to the final decision of the court.

Now, the proponents of the court enforcement system said that was too long. "We don't think that victims of discrimination should wait for two and one-half years to receive a remedy. We want a faster system." And that's why they rejected the cease and desist system.

I would like to, if I may, reserve a few minutes for rebuttal.

QUESTION: Just one more that will call for a brief answer.

Does this create problems for large employers in terms of setting up reserves for contingent liabilities?

MR. VAUGHN: The present system?

QUESTION: No, if the Government's position is

correct, that it is open --

MR. VAUGHN: Yes, the present system. The Government position.

Yes, Mr. Chief Justice, the potential contingent liability can be absolutely staggering and often one which you cannot measure. You don't know the duration or the extent of it.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Martin.

ORAL ARGUMENT OF THOMAS S. MARTIN, ESQ.,

FOR THE RESPONDENTS

MR. MARTIN: Mr. Chief Justice, and may it please the Court:

In 1972, Congress authorized the Equal Employment Opportunity Commission to enforce Title 7 in court, and abandoned dependence upon private enforcement that was universally deemed to be totally ineffective.

Section 706, which is the focus of this litigation, was designed to put the Government's enforcement muscle behind Title 7.

Now, the issue in this case is whether Congress intended that that enforcement muscle disappear after 180 days after the filing of the claim, or in the alternative, terminate according to the varied mandates of state statutes of limitations.

Before I go to the merits, I'd like to briefly expand upon the factual context in which this delay claim arises.

QUESTION: Mr. Martin, is there one other alternative, that Congress never even thought about the limitations question and Government action? Is there any evidence in legislative history they thought about this problem?

MR. MARTIN: I think there is evidence in the legislative history that they did not intend to have a short state statute or 180-day limitation.

I think, --to put it very briefly, and I will get back to it at further length -- Congress knew when it imposed upon the EEOC the requirement to investigate, to conciliate and to resolve as many of these problems by conciliation as it could.

Congress knew that that process took 18 to 24 months, and yet Congress required that as a prerequisite before you bring a Commission suit under --

QUESTION: That's a pretty effective argument to the effect that Congress wasn't very happy about that, though.

MR. MARTIN: Congress was unhappy --

QUESTION: They certainly didn't want it to continue.

MR. MARTIN: That's correct. It was unhappy about it, but it did not cut it off.

If I could go just a bit farther, I think I can

address your concern, as I develop it.

QUESTION: Mr. Martin, do you have any knowledge of figures as to how many cases filed with the Commission are settled by conciliation as contrasted with those that are not?

MR. MARTIN: I do, but I'd like to briefly indicate now what the Commission has done in this area.

First, let me talk about this case, then what the Commission does generally in response to your question.

When this case was brought, the San Francisco office of the EEOC had fewer investigators than there are members of this Court. It had a thousand discrimination claims before it. Nevertheless, they got to this claim within six months. Investigation was completed within a year. Within four months later, conciliation was begun with the Petitioner in this case. Conciliation went on for another six months, and then it was ended. And then, at Petitioner's request, conciliation was begun again for an additional five months.

QUESTION: What is conciliation?

MR. MARTIN: Conciliation is after the Commission has found out what the facts of the problem and the scope of the discrimination which occurs in -- allegedly occurs in the particular industry, they sit down with the individual respondent in an attempt to work out an agreement, either for back pay, possibly, or for an end to the particular discriminatory practice.

The whole purpose of the '72 amendment and the '64 Act, really, was to try to resolve as many of these claims through conciliation as possible.

QUESTION: And conciliation, typically, could go on for six months.

MR. MARTIN: Conciliation could. You can imagine a situation where you have a company, like AT&T, a massive company, thousands of people involved, hundreds of job categories, wages, transfer rights, unions involved. It is a very difficult process. It may involve difficult legal issues, and everyone wants to go back and analyze those legal issues.

So, as long as conciliation is worthwhile, the Commission has to follow it up. The statute says it can only bring suit when conciliation has failed. That's the congressional prerequisite to suit. The Commission has no choice. It can't end the business on the 179th day and sue, because Congress has required it resolve these matters through conciliation where possible. And that's what it is about.

QUESTION: Anything other than jawboning?

MR. MARTIN: Well, let's talk about results, I think, and get to Mr. Justice Blackmun's question.

Five thousand claims last year were resolved through conciliation.

Now, there were 80,000 -- Pardon me. There were over 40,000 discrimination claims resolved last year by the

EEOC, and that's with 2,500 full-time employees. Five thousand resolved through conciliation.

The percentage of claims over three years old was reduced from 20% to 5%.

So that, my point, I guess, is that when you have a delay it is a shared responsibility. It is not just the EEOC. It arises out of the nature of the work, the conciliation process, the magnitude of the discrimination problem in this country, and the limitations on the EEOC's resources.

QUESTION: Well, you don't say that with an ordinary statute of limitations. If the statute of limitations requires the Government to indict somebody within four years or bring a civil action within four years, you don't say to the defendant it is a shared responsibility. We've both got to get this case to trial.

MR. MARTIN: No, but when -- But I do say that if the situation is such that Congress has required conciliation and conciliation is a two-party business. In other words, respondents can encourage you to continue it and say it is still worthwhile and the Commission has to continue it. Congress must have set up a system that reflects this reality.

What I am saying is if you look at the scope of the problem and resources available, you get some reflection of what Congress must have intended.

Sure, Mr. Justice Rehnquist, if there was a clear

statute of limitations, there would be no defense to say it's partly the respondent's fault that we haven't met it. But, what we are suggesting is that there is no clear statute of interpretations -- statute of limitations -- and one should not be implied.

I'd like to turn to the merits of the case, and particularly to the language of Section 706(f)(1), which reads -- I think it is important to know what the language says. It says, "If within 180 days from the filing of such charge, the Commission has not filed a civil action, the Commissioner shall so notify the person agreed."

QUESTION: Can I stop you right there and ask what the Commission's view is as to whether that imposes any time limitation within which the Commission has a duty to notify the charging party?

MR. MARTIN: The interpretation of that language, from our point of view, is that it imposes -- It does two things. It sets out a time within which the Commission can conciliate with the respondent, without interference from private suit. A private party can't sue before 180 days. And it sets a time after which private party can demand and must receive from the Commission a right to sue letter.

QUESTION: It says the Commission shall so notify. That seems to impose a duty upon the Commission, with or without any request.

MR. MARTIN: That's right. The language does appear to do that, but the courts that have interpreted it -- Courts of Appeals -- have unanimously come to the conclusion that it couldn't possibly mean that. For this reason: The '72 Act was meant to set up a process where you would have -- resolve these claims through conciliation, if possible. That's throughout. And, if there has to be a suit, it ought to be a Commission suit, rather than a private suit.

Now, if you interpret this as a mechanical limitation, then 180 days after you have filed the claim, before the Commission has even probably gotten to this particular claim, the private party is going to have to sue or else his time will run. And, therefore, he sues without either the thing being resolved through conciliation or without knowing that the Commission might have brought suit if he had waited.

So it twists around the whole statute and fundamentally upsets or frustrates the congressional purpose.

QUESTION: So, in other words, as I understand your answer -- and this reflects an earlier question by my Brother Stevens -- your position is, first of all, that there is no time limitation within which the notice to sue must be given and, secondly, that there is no duty upon the Commission in the absence of a request to ever give a notice to sue. Is that right?

MR. MARTIN: That's not precisely correct.

When the Commission has decided that it cannot conciliate and will not sue, itself, in other words, fulfilled the congressional prerequisites, then the Commission must notify the charging party.

QUESTION: With or without request?

MR. MARTIN: With or without request.

Apart from that, it only notifies upon request.

QUESTION: And that decision is purely up to the Commission. If it decides that it is going to need seven years, it doesn't have to notify until the expiration of seven years.

That's your answer to Justice Stewart's question.

MR. MARTIN: I am somewhat disturbed about the characterization.

If it takes a long time to make that decision, it could go on for three years, it could go on --

QUESTION: It could go on for seven years.

MR. MARTIN: That's correct. It could go on for --

Now, let's look -- I think it is well to talk about how the courts can respond to that problem aside from a statute of limitations, and I think there are two ways.

First, is in terms of the remedy. If it is a truly stale claim,an injunctive remedy will not be appropriate.

If it is a -- talk about back pay which has been a consideration here. In Albemarle, this Court said --

QUESTION: Two year limitation.

MR. MARTIN: Prior to claim being filed.

But in Albemarle, this Court said that if a cause of action was prosecuted in such a fashion as to cause prejudice to the opposing party, back pay could be denied altogether.

And in EEOC v. General Electric, which is at 532 F.2d 359, the Fourth Circuit said that in a situation where a Commission suit has expanded the claim beyond what the charging party originally brought, back pay could be limited, not denied altogether, but limited.

So, there are equitable ways, in terms of Title 7's remedy, to deal with this problem.

QUESTION: Take a situation where --

QUESTION: (inaudible) by the employer, employee, aren't they?

MR. MARTIN: I don't think they are, Justice Blackmun. The point of the whole '72 Amendment is that he doesn't have to bring the suit. The Commission brings the suit. And so --

QUESTION: Well, you seem to argue all the way through that it is so much better for the EEOC to bring suit, rather than the employee. Why?

MR. MARTIN: I am not arguing that it is better from -- that this Court should think it's better, or that I think it's better. I am arguing that Congress thought it's better.

And the reason is, as they set out in the legislative history, that the costs of brining suit, from their point of view, were so great that valid Title 7 claims -- Let me quote it: "The costs involved effectively preclude a very large percentage of valid Title 7 claims from ever being litigated."

That's quoted in our brief at 26. And what the Congress is saying is that it is better for the Commission to bring suit because private parties won't bring suit. They don't have the money.

You do get counsel fees. You had counsel fees in the '64 Act, and yet Congress made a factual determination in '72 that was insufficient. That was Congress' judgment.

Let me give you some reasons why they were probably right. Attorneys' fees, first of all, are only discretionary, only if you win. It's only at the end of a process which may take years. The costs in a Title 7 suit are not just attorneys' fees. There are expert witnesses, computer time, experts on management, testing, investigators. It is a difficult and complex process to bring a Title 7 suit.

Congress said let's take this burden off the private party because it is not working and put that burden on the Government. First, giving them --

QUESTION: Why didn't they take it off completely?

MR. MARTIN: They wanted to give, as the report of the conference committee suggests rather clearly -- Congress

realized that the process may take eighteen to twenty-four months and, therefore, they said if a private party wants to get out, wants to escape the administrative quagmire, as the House report says, it ought to have the option to do so. And they gave that party the option after 180 days.

Any charging party, before the Commission, after 180 days, can just come to the Commission and say, "I want to get out of this. I want to sue, myself." But for the great bulk of them that's too expensive a proposition, or at least that's what Congress determined.

It seems to us the statute has to be interpreted in view of what Congress intended, what their view of the problem was, whether we agree with it or not at this point.

QUESTION: Mr. Martin, do you give the company any possibility of relief from a stale claim?

MR. MARTIN: In two fashions: First, in terms of the remedy. Take either no injunction, no back pay or limiting back pay.

Another possibility, which was done by the Fifth Circuit, is the use of the APA, 5 USC 706.

QUESTION: You forgot a word. I said "stale" claim, which the statute of limitations would just wipe out, or laches would just wipe out in --

MR. MARTIN: I claim that's prejudicial because it's so stale.

QUESTION: Is there any way at all that a company could come in and have the case dismissed?

MR. MARTIN: Yes. Under 5 U.S.C., Section 706, the courts of appeals have held in the Fifth Circuit, and I cite the Court to Exchange Security Bank, 529 F. 2d 1214. These are cited also in the briefs of one of the amicus here, the Texas brief. The charging party can come in and show to the court that there has been prejudice to him from the destruction of evidence as a result of delay, that the delay is a result of EEOC inaction, lethargy, or, you know, just letting the suit sit around, and the court can stop the suit.

So there is a result that's similar to laches that can be achieved under the APA.

QUESTION: That sounds like laches.

MR. MARTIN: It's very much like laches, except it's under the APA.

QUESTION: Since you put that in terms of the broad scope of the equity powers of a district judge, aren't you opening the door to having 397 different approaches to that problem by 397 different district judges? The Court of Appeals can't really lay down an effective set of guidelines.

MR. MARTIN: Again, I refer the Court to those opinions and the guidelines laid down are that you have to have -- it's in the nature of laches, that you have got to show prejudice.

QUESTION: It is a guideline that doesn't guide very much.

MR. MARTIN: It is a difficult case. We don't expect that there will be that many cases.

Let me talk about the results of what would happen if we followed the Petitioner's proposal.

180-days statute of limitations means that the 96,000 claims that are going to be filed before the EEOC this year, EEOC could get to very few of them, if any, depending on the backlog situation. Thousands of pending claims.

First of all, there are over 100,000 pending claims that would all be out in the courts. The new claims, 90,000 a year, would be in the courts.

Does that make any sense, especially in the light of Congress' determination that these things ought to be resolved through conciliation.

It's exactly what Congress was trying to avoid. And if you have a 180-day limitation, there is no other result.

QUESTION: What about the analogous statute of limitations?

MR. MARTIN: State statute of limitations?

QUESTION: What about that as a fall-back position?

MR. MARTIN: Well, the state statute of limitations, first, as a legal matter -- The rule has always been that state

statutes don't apply to the Federal Government in the absence of some intent.

QUESTION: Well, we've managed now for nearly -- for over 20 years to function under the Federal Tort Claims Act, using much more elusive standards of law, state law, than a statute of limitations.

MR. MARTIN: Oh, yes, but the Tort Claims Act specifically requires the application of state law.

QUESTION: You are suggesting -- I was merely responding to your suggestion that it is not workable.

MR. MARTIN: Okay.

On the policy point, it gives the Commission somewhat more time, but we have to understand the state statute of limitations may run -- maybe a year statute of limitations, for example.

The Commission's cause of action may not accrue for 300 days after the injury has occurred, and what sense does it make to apply a state statute of limitations when the Commission's cause of action doesn't accrue, because the Commission can't sue until the claim has been filed, which in some cases may be 300 days after the injury occurred. It usually is 180, depending upon whether there is a state FEP system.

Secondly, the Commission has to investigate and conciliate and go through all those steps, and until it finishes

that process no cause of action accrues.

So you have a state time limitation running and yet the Commission can't sue. That can hardly be a sensible result. It just doesn't work, and, moreover, it's not necessary.

If there is a real prejudice case -- and this isn't. Petitioner has never alleged he was prejudiced. He obviously shared the responsibility for the delays here, but if there was one -- then the courts could take care of that on an ad hoc basis through the APA or through the relief provisions.

I'd like to speak briefly to the two assumptions that Petitioner made at the outset, that somehow the Congress viewed the delay problem as resulting from EEOC ineptitude, and Congress decided, well, let's put a stop to it by putting in this 180-day provision.

There are two reasons why that's got to be wrong. First, Congress viewed the delay problem as resulting from the scope of the Commission's task and not from EEOC foot-dragging.

I refer the Court to Page 12 of the House Report 92238, for Congress' view that delay arises from "the burgeoning workload, accompanied by insufficient funds and a shortage of staff."

And the Senate Report 92415, at Page 4, described the EEOC's efforts as heroic at that point.

Does that sound like Congress wants to put a 180-day

limitation on them? It just doesn't make sense.

Secondly, the language that they rely upon, the notification provision, could not have been a response to the delay problem because that language was in the '64 Act.

QUESTION: Well, it is quite possible, isn't it, that Congress could have thought the processing of these things was taking too long, without in any way reflecting on the performance of the individuals who were doing it. Maybe the Government just didn't have enough staff in the agency.

MR. MARTIN: And then Congress had the choice to eliminate the process altogether or greatly expand the staff and put some reasonable time limitations, but Congress did neither.

QUESTION: Well, you suggest that Congress always carefully works those things out. You know, they have enlarged a lot of causes of action in the courts without creating a whole lot of new judgeships, too.

MR. MARTIN: Sure. Absolutely, but the opposite assumption must be that Congress had a process that took 18 to 24 months and said, well, from now on, it is going to take 180 days and that is it.

That just can't work, as long as Congress wants to resolve these things through conciliation and through Commission suit and not private suit. If that's the intent, and I think if you read the legislative report that has to be the intent,

then there can't be such a short state statute of limitations.

QUESTION: Out of every 100,000 claims that are filed with the EEOC, what percentage are, a) conciliated successfully, or two, litigation is filed?

MR. MARTIN: Well, I do have the claims on the successful conciliation. The 5,000 figure I gave you were the successful conciliations out of 40,000 claims filed.

QUESTION: 5,000 out of 40?

MR. MARTIN: Successful. And, in terms of litigation, I do not have those figures.

But, once again, that's --

QUESTION: Well, you certainly didn't file suit in the other 35,000.

MR. MARTIN: Absolutely not.

QUESTION: Even though there was no time limit --

MR. MARTIN: Many of them were dismissed for lack of evidence.

QUESTION: Even though there was no time limit whatsoever.

MR. MARTIN: That's correct.

QUESTION: So, when you are talking about all these cases being filed in the courts, you are only talking about the cases that you think you have a successful -- a pretty good chance of conciliating, but you don't have time to do it, so you file suit.

MR. MARTIN: Well, what I am talking about is that the private party -- If the Commission is cut off after 180 days, the private party has no alternative but to go file suit.

QUESTION: He certainly has alternative. He can trust his chances and says, "I've got a lousey chance," and doesn't file suit.

QUESTION: And just forget it.

QUESTION: You say that most private parties can't afford to sue, anyway.

MR. MARTIN: Well, what I am saying is that Congress determined that there were valid claims not being taken care of because the costs were too great. So, you are either going to have the valid claim not being taken care of in contravention of the '72 Amendment, or you are going to have these people filing suit. It's one or the other. You know, some people may drop out altogether.

QUESTION: You mentioned 100,000 cases a year, new cases. Assuming just for the moment, that there were that many meritorious claims, which is a large, large assumption, how many hundreds of lawyers would it take to process those? Any studies or any estimates on that at all?

MR. MARTIN: To litigate them all? It would be an enormous number. I don't know any studies, in response to your question.

QUESTION: In percentages, how many cases were found to be lacking in merit or frivolous?

MR. MARTIN: We simply don't have those figures.

QUESTION: A very large percentage, is it not?

MR. MARTIN: I think a large percentage are found to be lacking in evidence, and are not pursued.

But, isn't it better to have that found out through a conciliation process by the Commission than before the court?

QUESTION: In volume, how many EEOC cases have been filed by EEOC?

MR. MARTIN: Litigation?

QUESTION: Yes.

MR. MARTIN: We do not have that figure. If I can come up with that figure, I will submit it to the Court and to counsels.

QUESTION: In terms of the number of claims filed, I should think you would know, the Commission would know.

MR. MARTIN: It certainly can be found out and we will find out and submit it to the Court. But, I guess what we are suggesting is that what Congress --

QUESTION: This is pertinent to the argument you have been making that if 180 days is the limitation, there is going to be a flood more of EEOC cases.

MR. MARTIN: No, no. EEOC cannot file --

QUESTION: Oh, I see, you will turn them over to --

MR. MARTIN: We can't file them, because we haven't fulfilled the statutory prerequisites. We haven't conciliated.

QUESTION: If this all comes about, though, the analogous statements of the statute of limitations, that would take an enormous amount of pressure, this 180-day pressure, that you speak of, off of the Commission; would it not? And it wouldn't be any great research undertaking to have someone make up a table of all the analogous statutes of the 50 states and the District of Columbia, would it?

MR. MARTIN: It would not take the pressure off because the statute -- depends on when the statute runs. If you are assuming the statute runs from the time of the injury, okay. -- From the time of the discrimination, for 180 days and perhaps 300 days, it is not even filed with the Commission. And then the Commission still has to investigate and conciliate before it can file suit.

The pressure will be exactly the same, Mr. Chief Justice, unless the statute runs from a different time.

Let me note that the Fifth Circuit, in cases following Griffin Wheel, they've held that the state statute is told during the Commission proceeding -- the District Courts following Griffin Wheel.

And in that situation, I refer to 416 F Sup. 1006. It is the only District Court case following Griffin Wheel.

They told the state statute while the Commission is proceeding.

QUESTION: Griffin-Weil is the one that took the other position from this --

MR. MARTIN: That's right. He said the state statute applied.

QUESTION: Mr. Martin, do you agree with me that our profession is one that only operates on deadlines, that we never do anything ahead of time?

MR. MARTIN: There are sometimes delays in the legal profession, I will agree.

QUESTION: Have you ever seen anybody file a brief a day ahead of time, a lawyer?

MR. MARTIN: Very seldom, Mr. Justice --

QUESTION: Don't you think it would be good in this statute to put a time limit on it?

MR. MARTIN: A) It might be good in this statute, but would have to be a time limit that is consistent with the workload of the Commission, the difficulty of the problems it has, and the process. It would have to take into consideration the days that the -- the fact that the charge may be deferred to a state commission and they might never get it until 300 days.

They have to take into account that you have to conciliate before you sue, and you take into account the resources they have, the scope of the discrimination problem

in this country. Put that all together and then set a reasonable statute of limitations.

That might be good for Congress to do. All I am suggesting is Congress didn't do it.

QUESTION: Is there any other Federal Commission or Agency that is authorized to bring suits against private citizens without any statute of limitations whatever? Infinity actions?

MR. MARTIN: The analogy that the Court of Appeals drew was to the NLRB process, in which the court said that no state statute of limitation applied.

I don't know whether there is a Federal statute that applies there. I presume not from the thrust of the opinions.

Congress -- I think the way to approach the problem is that Congress gave the Commission a special role. It said it was supposed to be the primary enforcer of Title 7.

This Court has numerous times said that Title 7 is of the greatest importance in terms of a policy. So, Congress has determined, thirdly,that, as a factual matter, these suits would not be brought and rights would not be vindicated but for the Commission suit. It set up a process of conciliation, and then litigation where necessary, and if litigation is necessary that the Commission should bring it, and these limitations would frustrate them.

QUESTION: Do you really think that Congress would allow suit fifteen, twenty years afterwards?

MR. MARTIN: I think Congress would expect, as everyone here would expect, that the courts would say that that suit is barred, that particular suit.

QUESTION: Barred by what?

MR. MARTIN: As I suggested, that the APA could be used in a laches type concept to bar that particular suit.

What I am suggesting is the individual, if there is a prejudice claim, the courts can take care of that.

QUESTION: Prejudice in the sense that interest runs on claims for back pay, and on the uncertainty as to whether positions can or cannot be filled by other individuals. There is always prejudice.

MR. MARTIN: If there is a showing of prejudice, the District Court can respond by limiting back pay to -- back pay altogether, only granting injunction or not granting an injunction.

We are equipped to respond in a particular case, but but if we propose a state statute of limitations, thousands of cases which Congress determined ought to have been considered, conciliated and possibly sued upon by the Commission, will not be.

QUESTION: Has there been prejudice in this case?

MR. MARTIN: I think not. There has been no showing;

of any. There has been no claim of any.

If Petitioner sits down and asks the Commission, "Well, let's continue to conciliate a bit longer. I think we can get this resolved," and the Commission says, "Yes, we will conciliate a bit longer," and they spend another six months. I wouldn't call that prejudice.

QUESTION: What is left of this case?

MR. MARTIN: This case does, in response to a question raised earlier, raise a continuing claim. On page 10 of the Appendix, there's reference to the complaint which is a continuing claim of Title 7 discrimination.

This case would go on, regardless.

QUESTION: Mr. Martin, may I ask you a question about the statutory language: "Shall so notify the person aggrieved" and so forth, the mandatory language. Is it possible to read that section to say that if the conditions preceding that, namely, that 180 days have gone by and there has been no conciliation, and so forth. Then the Commission has a mandatory duty to notify the private plaintiff who may then bring suit within 90 days, but that doesn't put any limit on the Commission's right to bring subsequent suit. Would that be a possible construction?

MR. MARTIN: That would be a possible construction.

QUESTION: It seems to be all it says.

MR. MARTIN: And then the Commission could sue.

QUESTION: But the Commission doesn't so interpret it that way. They don't think they have any mandatory duty at all, do they?

MR. MARTIN: Of course, that question isn't in the suit, but the Commission doesn't want the private party's right to run before the Commission has decided whether or not it will sue.

QUESTION: Maybe that's what Congress ordered it to do.

MR. MARTIN: Well, the legislative history, as far as we can determine, is the other way.

Let me refer you, Justice Stevens, to Tuft v. McDonnell, 517 F. 2d 1301. That's an Eighth Circuit case which analyzes this particular section and the notice provisions and the notice requirements. I think it will be helpful in that regard, but legislative history simply won't support that analysis.

If there are no further questions, I thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Vaughn? You have a few minutes.

REBUTTAL ORAL ARGUMENT OF DENNIS H. VAUGHN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. VAUGHN: Yes, Mr. Chief Justice.

Just really three or four points.

On this point of claim of prejudice, the Assistant

Solicitor General takes the position that there is no prejudice here to Petitioner, that we have never claimed prejudice. It is the nature of a statute of limitations defense, of course, that prejudice is assumed, need not be proven.

We did not raise the issue of laches in our motion for summary judgment for the simple reason that Laches is virtually impossible to prove by way of summary judgment because it is factually oriented and there will be substantial differences with respect to material fact. Therefore, Laches has never been a part of this case, any time from the beginning, but I think there is no obligation upon us to prove prejudice in order to prevail in this manner.

I think that Mr. Justice Marshall in a very real sense put his finger right on it when he referred to the propensity of lawyers to put off until tomorrow what they could do and should do today.

Now, I don't think we lawyers are the only ones guilty of that. Parkinson's Law, I believe, was something to the effect that work expands so as to fill the time available for its completion.

And if one is not given a deadline to comply with, one is going to put off that project until tomorrow, and tomorrow and tomorrow. And that is exactly what is happening here.

The Solicitor General says that there are 90,000 new

cases every year and we, the EEOC, won't be able to do anything with them, so we'll have to march them right into court.

Well, they are assuming the negative. They are assuming they won't, or can't, do anything. But the fact of the matter is they can do something. They can investigate those charges. They can conciliate those charges. They can make judgments about which ones to take to court, and they can make judgments about which ones may be taken to court just as well by the individual private parties.

After all the National Labor Relations Board, with an influx of cases, roughly half of that 90,000 figure, about 45,000 a year, has a median time from charge to completion of investigation of 43 days.

QUESTION: How big is their staff, if you know?

MR. VAUGHN: I think their staff is somewhat smaller than that of the EEOC, but I can't give any reliable figures.

You know, one reason, Mr. Chief Justice, that they have a median time of 43 days is because they have a time limit internally imposed upon themselves at 45 days.

QUESTION: But they are not obligated to conciliate the way the EEOC is?

MR. VAUGHN: They don't have a statutorily mandated obligation. They do, however, come to a charge party, Mr. Justice Rehnquist, and they say, "We are going to file a complaint two days from now unless you reinstate these

employees and give them back pay."

Well, that's a form of conciliation. You decide right away what you are going to do, and you have two days in which to do it, and if you don't reinstate with back pay, in comes the complaint.

I see my time is up.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:59 o'clock, p.m., the case in the above-entitled matter was submitted.)